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November 15, 2000

Re: STB Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures
Our File: 2452.63

VIA UPS NEXT DAY

Surface Transportation Board
Office of the Secretary
Case Control Unit - ATT. STB Ex Parte No. 582 (Sub-No.1)
1925 K Street, N.W.
Washington, D.C. 20423-0001

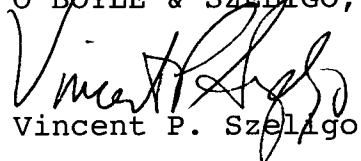
Dear Sir or Madam:

Enclosed are the original and twenty-five copies of the Comments of U.S. Clay Producers Traffic Association, Inc. on the October 3, 2000 Notice of Proposed Rulemaking for Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1).

A copy of this submission has been served upon all parties on the Board's service list. A diskette with containing a Word Perfect 9.0 electronic copy of the Comments is also enclosed.

Very truly yours,

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.


Vincent P. Szeligo

SC

Enclosures

cc: US Clay Producers Traffic Association
All Parties on EP 582.1 Service Orders

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Ex Parte No. 582 Sub-No. 1

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.

I. INTRODUCTION.

The U.S. Clay Producers Traffic Association, Inc. ("USCPTA")¹ has twice before submitted comments on the subject of major rail consolidation procedures. In response to earlier requests by the Surface Transportation Board ("Board") for public input, USCPTA submitted Comments for Ex Parte No. 582 in February, 2000. Comments were also submitted Ex Parte No. 582 Sub-No.1 in May, 2000. Finding that the Surface Transportation Board's October 3, 2000 Decision and Notice of Proposed Rulemaking ("NPR") failed to adequately address the serious service disruption problems which the Board acknowledged to exist, USCPTA hereby submits the forgoing Comments to the Notice of Proposed Rulemaking.

The Board's October 3rd Notice of Proposed Rulemaking recognizes the real possibility of the type of merger related service disruption damages mentioned by USCPTA; however, the Board stopped short of proposing a complete remedy. While USCPTA proposed implementation of a

¹ U.S. Clay Producers Traffic Association, Inc. ("USCPTA") is a non-profit association of producers of clay engaged in producing and shipping clay in all modes of transportation from the relatively concise geographic location of clay deposits in Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed to provide information to members concerning transportation of clay by railroads, motor carriers and by water, as a forum for discussion of developments and information concerning regulation by governing authority of clay transportation, and to represent the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of USCPTA, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments.

formal administrative procedure in which damages for service harm can be awarded in appropriate circumstances, the Board instead opted for an informal, non-binding procedure which in reality is nothing more than supervised negotiation. USCPTA's proposals were summarized by the Board at page 323 of its decision as follows:

U.S. Clay Producers Traffic Association. USCPTA, which indicates that its members have incurred substantial losses on account of the service disruptions that followed the UP/SP and CSX/NS/CR transactions, contends that Class I railroads should be held fully accountable for their merger-related miscalculations, and, in particular, should be required to compensate shippers for damages caused by merger-related service disruptions. Service guarantees should be established, USCPTA insists, in recognition of the principle that where damage is caused by a carrier's miscalculations, the cost of that damage should be borne by the carrier and not by the shipper. And, USCPTA adds, if our regulations provide that railroads will be held fully accountable for damages caused by their miscalculations, the public will be protected because railroads will no longer enter into mergers lightly.

(1) USCPTA contends that we should require major merger applicants to present detailed proof of their ability to smoothly assimilate the merged lines without a deterioration in service as measured by transit times and terminal dwell times.

(2) USCPTA contends that we should create an administrative procedure enabling shippers to claim and recover merger-related damages. USCPTA argues that, if shippers must resort to the courts to prosecute their service disruption damage claims, many meritorious claims will not be pursued due to the high cost and uncertainty of litigating transportation issues in the courts. USCPTA adds that, with an administrative damage recovery procedure, shippers would not be forced to use thousands of courts across the country, each with its own state law precedents, but could seek relief instead in a standardized administrative proceeding adjudicated by Administrative Law Judges familiar with concepts such as transit time, terminal dwell time, and car leasing arrangements.

(3) USCPTA contends that, to ensure that the railroads do not shift the costs of merger miscalculations to shippers, we should impose a condition making the merged railroad liable for merger-related damages sustained by shippers (including costs attributable to delays, and also the costs incurred in securing alternative transportation). USCPTA further contends that we should re-examine our recent decision that (USCPTA claims) allows a merged railroad to treat service disruption costs as normal costs. USCPTA insists that, if a railroad (in this instance, UP) is to be held accountable for its mistakes, it should not be allowed to pass the costs of its mistakes on to shippers.

(4) USCPTA contends that we should increase the procedural burden on Class I merger applicants by requiring the submission of: (a) detailed contingency plans examining the possibility of resulting service disruptions; and (b) impact statements projecting the costs of service disruptions that could be caused by a miscalculation. USCPTA believes that, by requiring railroads to develop this evidence, we would force them to take a good hard look at the possibility that their actions may cause serious harm.

II. COMMENTS.

The Board is moving in the right direction by requiring merger applicants to submit detailed service assurance plans and by recognizing that it must "give greater attention to the potential for transitional service harms". The Board would accomplish this by providing a forum for discussion and negotiation. However, simple attention to or monitoring of merger related service disruption claims is meaningless in the absence of an enforcement mechanism, which USCPTA believes should be accomplished through an administrative procedure.

1. Service Assurance Plans.

USCPTA is pleased that the Board agrees with its first recommendation. The requirement for submission of detailed service assurance plans will force applicants to engage in a realistic analysis of the operational issues before the transaction is consummated. More thorough advance planning can help avoid some of the problems, but moreover, it can alert applicants to their potential liability for damages caused by combinations which pose a substantial risk of causing serious, long term disruptions. If applicants are aware of the possibility of substantial damage awards compensating shippers for harm experienced as the result of a merger, they will be less likely to proceed before all the details are well planned out.

2. Attention to Potential Transitional Service Harms.

The Board recognized that shippers have suffered damages as the result of service disruptions caused by some recent mergers; however, USCPTA is disappointed that the Board stopped short of creating a complete remedy to address these harms. The NPR states that the Board plans to continue its own "informal" process for handling complaints. While use of an informal complaint procedure is a good first step, the Board's failure to establish a formal complaint process strips the initiative of any real impact.

The Board explains that it will engage in "extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate" and that it will require railroads to establish "problem resolution teams" and to adopt "specific procedures for problem

resolution ... to ensure that... claims ... are properly addressed". However, the Board fails to answer the simple question: "What happens if the railroads do not honor service disruption damage claims?"

The USCPTA believes the Board clearly has the legal authority to adjudicate damage claims arising from mergers to the same extent it has authority to impose conditions. A formal administrative proceeding would just be a more straightforward and direct way of ensuring claims are properly addressed than the informal procedures proposed by the Board.

The language of proposed rule 49 C.F.R. ¶ 1180.1(g) ("Oversight") and (h) ("Service Assurance and Operational Monitoring"), as discussed at pages 19 - 20 of the October 3rd NPR are too vague. They fail to state that Board will use its authority to award damages in the event disputes cannot be successfully be negotiated. Since the Board appears willing to take action to enforce the representations made by merging railroads concerning projected service levels, USCPTA recommends the following revisions to ¶ 1180.1(g) and (h):

Proposed § 1180.1(g): Oversight. *As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions, **including the award of damages**, it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.*

Proposed § 1180.1(h): Service assurance and operational monitoring.
(1) Good service is of vital importance to shippers. Accordingly, applicants must file, with the initial application and operating plan, a service assurance plan, identifying the precise steps to be taken to ensure continuation of adequate service

*and to provide for improved service. **Levels of adequate service which applicants represent in such plans will be binding and they will be held liable for any failure to meet such service levels.** This plan must include the specific information set forth at § 1180.10 on how shippers and connecting railroads (including Class II and III carriers) across the new system will be affected and benefitted by the proposed consolidation. As part of this plan, the Board will require applicants to establish contingency plans that would be available to address the negative impacts if projected service levels do not materialize in a timely fashion.*

(2) The Board will conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

*(3) We will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed. **A claimant who has participated in this informal process but is unable to reach a satisfactory resolution may petition the Board to review the claim and award damages.** Also, we would envision the establishment of a Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues.*

(USCPTA suggested revisions are **Bold and underlined.**)

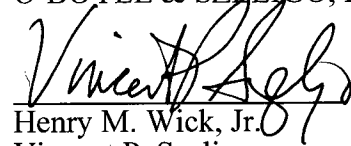
The "Rail Consumer Assistance Program" announced by the Board on November 2, 2000 is a form of Board intervention in the dispute resolution process, but one that again falls short of being a truly effective remedy. The Board's press release states the program is "intended to strengthen the capability of the Board to informally address those issues which cannot be satisfactorily resolved through private-sector discussion." USCPTA agrees that aggrieved parties should first attempt to resolve problems through discussion and negotiation, but stresses that the rules should follow the thought through to conclusion and specifically state that the Board will get involved if the negotiations fail to resolve the dispute.

IV. CONCLUSION

USCPTA applauds the proposed rules for implicitly recognizing that merger applicants are legally responsible for the damages caused by merger related service disruptions and requiring that applicants establish problem resolution teams to ensure that claims are promptly addressed. The

applicants establish problem resolution teams to ensure that claims are promptly addressed. The Board's sole reliance on informal procedures to address damage issues is insufficient. The Board should provide a well-defined administrative remedy which specifically mentions the Board's authority to award damages in appropriate cases.

Respectfully submitted,
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Dated: November 15, 2000

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